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In the Supreme Court of the United States

OCTOBER TERM, 1980

SHELL OIL COMPANY AND HARBOR TOWING CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend that the court of appeals, in reversing the district court's dismissal of the government's complaint, erred in holding that the government's suit to recover the costs of oil spilled by petitioners into the navigable waters of the United States was not time-barred.

1. This is an action by the government under the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. III) 1321, to recover the costs of cleaning up an oil spill. The government's complaint alleged that petitioners had spilled oil into the Patapsco River on August 10, 1975, and that the government had expended nearly $500,000 in cleaning up this oil from

the waters and surrounding beaches, boats, and booms. The government's clean-up operations were completed on September 12, 1975. This suit was filed on September 6, 1978.

The district court granted petitioners' motion for summary judgment and dismissed the complaint as time-barred. The court held that the three-year limitations period for actions founded upon a tort (28 U.S.C. (& Supp. III) 2415(b)) applies to suits by the government to recover clean-up costs under the Federal Water Pollution Control Act; that the government's cause of action arose on the date of the oil spill; and therefore that the three-year period had expired before the government had filed its suit.

The court of appeals reversed and remanded for further proceedings on the government's complaint (Pet. App. 1a-14a). Assuming arguendo that the three-year limitations period of 28 U.S.C. (& Supp. III) 2415(b) applied to this action, the court held that the government's cause of action under the Federal Water Pollution Control Act did not accrue until its clean-up operations had been completed (Pet. App. 5a) and hence that the instant suit was timely filed within three years of the "undisputed" completion date of September 12, 1975 (*id.* at 7a).

2. Because the decision of the court of appeals is interlocutory in nature, further review at this time is unwarranted. The decision below merely places petitioners in the same position they would have occupied if the district court had denied their motion for summary judgment in the first instance, and it is clear that such a denial would not have been subject to pretrial appeal. The same considerations that counsel against an interlocutory appeal of the denial of a summary-judgment motion militate against in-

terlocutory review of the present petition by this Court. Following a final judgment in the district court and completion of appellate review, petitioners will be able to raise the statute-of-limitations issue, together with any other issues concerning their liability under 33 U.S.C. (& Supp. III) 1321(f), in a single petition for a writ of certiorari.[1]

3. In any event, the decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

The court of appeals held that the complaint in this case was timely filed because "[t]he cause of action [under the Federal Water Pollution Control Act] for recouping expenses incurred by the government does not fully accrue until the government has completely exercised its option [whether to remove the spilled oil] and completed the cleanup operation" (Pet. App. 5a).[2] This holding is entirely consistent with the text and operation of the Act.

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[1] This Court will "not issue a writ of *certiorari* to review a decree of the * * * [c]ourt of [a]ppeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893). See also, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916). To grant review in the circumstances of this case would entail "the inconvenience and costs of piecemeal review * * *." *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 511 (1950).

[2] Contrary to petitioners' suggestion (Pet. 5, 7), the court of appeals did not hold that the three-year limitations period for tort suits is applicable to actions to recover clean-up costs under the Federal Water Pollution Control Act. Rather, the court held only that this case was not time-barred even

Under the Federal Water Pollution Control Act, "[t]he primary duty for cleaning [up] the oil spill, was of course, upon the [c]ompanies" (Pet. App. 4a; citations omitted).[3] In addition, however, the Act also provides that "[w]henever any oil * * * is discharged * * * into or upon the navigable waters of the United States * * *, the President is *authorized* to act to remove or arrange for the removal of such oil * * * at any time, unless he determines such removal will be done properly by the * * * [responsible private parties]." 33 U.S.C. (& Supp. III) 1321(c)(1) (emphasis added). Thus, the Act gives "the Executive Branch an option" (Pet. App. 4a) by authorizing the President, in his discretion, to undertake to remove the oil "[i]n order to avoid the obvi-

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assuming the applicability of the statute of limitations urged by petitioners. Therefore, the court did not consider the government's additional arguments that no statute of limitations applies to this statutory action to recover clean-up costs and that, if a limitations period is applicable, the action is quasi-contractual in nature and thus subject to a six-year limit (Pet. App. 4a).

[3] Petitioners claim (Pet. 7-8 & n.6) that polluters are under no obligation to clean up their oil spills and indeed are not even permitted to do so in the absence of permission by the President. In petitioners' view, the Act imposes upon the President the affirmative duty to clean up such spills. This novel contention is inconsistent with the plain language of the statute, which "authorize[s]" but nowhere requires the President to act. Moreover, the Conference Report, in the sentence immediately following that quoted by petitioners (Pet. 8 n.6), makes clear that the statute "is not to be construed to inhibit or prevent any owner or operator from undertaking whatever action is necessary to contain or remove an oil discharge." H.R. Conf. Rep. No. 91-940, 91st Cong., 2d Sess. 38 (1970).

ous consequences of possible delay or ineffectiveness" by the private parties (*id.* at 4a). In exercising this option, "[t]he President may act or decline to act. * * * [Moreover,] once a government cleanup is started it can be delayed at the direction of the President. * * * [And g]overnment action in appropriate circumstances might be terminated prior to completion" (*id.* at 5a).

As a concomitant to this authority, the Act entitles the United States to recover actual costs of removal up to (a) full costs in cases of willful negligence or willful misconduct, or (b) costs within statutory limits in all other cases. 33 U.S.C. (& Supp. III) 1321(f). Since this cause of action to recover clean-up costs is grounded on the government's effort to remove the oil spill, and since that effort is still in progress and subject to modification prior to completion of the clean-up, the "injury" addressed by the statute does not occur until the removal of the oil has been finished. Accordingly, the court of appeals correctly held, consistent with the general law on statutes of limitations cited by petitioners, that the government's cause of action did not accrue until the removal of the oil had been completed and the statutory injury to the United States had become final.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

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